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THE LIABILITY OF A RESIDENT OF NEW YORK AS STOCKHOLDER IN A FOREIGN CORPORATION was the question involved in a recent case before the Court of Appeals of that state. Lotus N. Southworth, as trustee of the Remington Automobile & Motor Company, bankrupt, Respondent, vs. Andrew D. Morgan, Appellant, 205 New York, 293; 98 N. E. 490. Decided April 30, 1912. The directors of the Remington Company, a New Jersey corporation, in order to interest local capital, passed a resolution to issue a portion of its stock at $25 per share, the par value being $100. Defendant signed an agreement to take two shares upon the distinct understanding and oral agreement with the general manager and secretary of the corporation that $25 fully paid for each share. In 1902 the company was adjudged a bankrupt and in 1906 the United States District Court granted an order directing a call or assessment upon the defendant and others for $75 per share to meet the claims of creditors. The defendant was thereafter sued and the Supreme Court of New York, Appellate Division, held (143 App. Div. 648), that the agreement to take stock at less than par was valid as between the corporation and the subscriber but not binding against creditors of the corporation who might recover from the subscriber, the difference between the price paid and the par value of the stock. The Court of Appeals now holds that the liability of the defendant is to be determined by the law of the state in which the company was incorporated but since the relevant laws of New Jersey were not pleaded, the court cannot take judicial notice of them, and in the absence of evidence to the contrary the common law of New Jersey is presumed to be the same as the common law of New York. This the Court points out does not impose any liability upon stockholders of foreign corporations beyond what may be contractual. There is no statutory prohibition in New York against the issuance of shares of the capital stock of foreign corporations for less than their par value, nor do the principles of the common law of the state work such results. The subscription, as expressed in the agreement between the defendant and the corporation, has in the opinion of the court, been completely fulfilled by the payment in full of the sum it bound him to contribute and therewith his liability to the corporation or the creditors terminated unless there issued from the trust fund doctrine through implication a contract which nullified the express stipulation that $25 was the whole sum to be paid upon each share, and substituted in its place the requirement that as to creditors there should be paid $100 or so much thereof as the satisfaction of their demands made necessary. This the court believes is beyond the potency of that doctrine, which does not create or nullify subscriptions but lays hold of the assets of an insolvent corporation and in doing that compels subscribers to perform their legal duties; but it does not beget these duties or obligations; it does not make unlawful or invalid a subscription which apart from it, was valid and lawful. The question with it is, has the subscriber fully performed the subscription agreement as it in fact and in law exists and an affirmative finding renders it, the doctrine, inapplicable and inoperative. In the case at Bar, there were no statutory conditions upon which the shares might be owned. The agreement between the defendant and the corporation expressed with completeness the obligations and liability of the defendant for his shares. He fulfilled the obligations and thereby destroyed the liability. The case of Conrad Milliken, as Trustee in Bankruptcy of the Standard Nitrogen Company, Appellant, v. Enrico Caruso, Respondent, was decided at the same time on the principles applied in the above case. The Standard Nitrogen Company, a North Dakota corporation, issued one thousand shares of a par value of $5 each to one Caruso for the sum of $2,000. The mere issue and acceptance of the stock, the Court holds, did not constitute a promise to pay the $3,000, the part of their face value remaining unpaid or any part thereof.

AN INTERESTING INTERPRETATION OF THE TRUST FUND DOCTRINE by the Court of Appeals of New York is contained in the opinion in Southworth vs. Morgan, referred to above, in which the Court

points out that contrary to the common law of England, the doctrine secures to the creditors of insolvent corporations the right of enforcing subscriptions for shares of which the corporation has deprived itself by release or defeasance. It does not create any fund or security for the benefit of creditors with respect to the authorized but unsubscribed capital stock, nor is there any in the excess of the nominal value over the *subscribed value* of the shares. It merely lays hold of the assets of an insolvent corporation and in doing that compels subscribers to fulfill their legal obligations and perform their legal duties. Now, in the absence of statutory conditions, subscription agreements through their express provisions or implications are the sources and measure of the duty of a subscriber. That is, if the subscription agreement stipulates that a sum less than the par value of the stock shall be considered as full payment thereof, the subscriber is liable only for the sum so stipulated. Should there be a governing statutory provision, the measure of the subscriber's liability is increased accordingly, as for instance, where the statute provides that the subscriber shall be liable for the difference between the amount paid and the par value of the stock. In other words, the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute.

To what extent do the statutes of New York increase this contractual liability?

The history of the statutes relating to the consideration for issue of stock and the liabilities of stockholders appears below:

Chapter 564 of the laws of 1890 reads as follows:

"Section 42. No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation at its fair value, and all stock issued in violation of the provisions of this section shall be void."

"Section 67. The stockholders of every stock corporation shall, jointly and severally, be personally liable to its creditors to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by the corporation until the whole amount of its capital stock shall have been paid in and a certificate thereof * * * filed and recorded * * *."

This was amended by chapter 688 of the laws of 1892 to read:

"Section 42. No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. *No stock shall be issued for less than its par value.* No bonds shall be issued for less than the fair market value thereof."

"Section 54. The stockholders of every stock corporation shall, jointly and severally, be personally liable to its creditors to an amount equal to the amount of stock held by them respectively for every debt of the corporation until the whole amount of its capital stock issued and outstanding at the time such debt was incurred shall have been fully paid."

In 1901 these provisions were amended to assume their present form and now constitute sections 55 and 56 of the Stock Corporation Law.

"Section 42. No corporation shall issue either stock or bonds except for money, labor done or property actually received for the use and lawful purposes of such corporation. Any corporation may purchase any property authorized by its certificate of incorporation or necessary for the use and lawful purposes of such corporation

and may issue stock to the amount of the value thereof and the stock so issued shall be full paid stock and not liable to any further call, neither shall the holder thereof be liable to any further payment under any of the provisions of this chapter; * * *."

"Section 54. Every holder of capital stock not fully paid, in any stock corporation, shall be personally liable to its creditors *to an amount equal to the amount unpaid on the stock* held by him for debts of the corporation contracted while such stock was held by him * * *."

Section 40 of chapter 688 of the laws of 1892 provided that no stock should be issued for less than its par value. By the amendment of 1901 this restriction was abolished. It also appears that the stockholder's liability under the amendment of 1901, section 54 above, is limited "to an amount equal to the amount unpaid on the stock." What is the meaning of the words "amount unpaid on the stock"? According to the court it is measured by the "subscribed value" of the stock. For beyond this it says the trust fund doctrine cannot reach: it does not create a liability measured by the nominal value of the shares unless the subscribed value and the nominal value are the same. In ninety-nine cases out of a hundred, the par value is tacitly understood to be the subscribed value by both corporation and subscriber; but in the hundredth case an attempt is made to issue shares full paid for less than par but not with a clear unequivocal agreement that such amount shall be the subscribed value beyond which no liability exists.

QUERY. Is it possible by a subscription agreement clearly stipulating that a sum less than par value shall be the full measure of the subscriber's liability on the shares subscribed for, to issue stock of a New York corporation at a "subscribed value" less than the par value and, under the decision above referred to, save the subscriber from any further liability to creditors of the company in case of insolvency?

THE DOUBLE LIABILITY OF STOCKHOLDERS IN MINNESOTA CORPORATIONS referred to in The Corporation Trust Company Journal No. 31 may be imposed not only upon stockholders of the company at the time of its insolvency, but also upon persons who were formerly stockholders; the Minnesota statute declaring that the transfer of stock does not exempt a stockholder from liability upon all the indebtedness existing at the time of the transfer. A suit in Minnesota determining the amount of liability of a past stockholder was recently held conclusive upon a resident of New York (Hamilton v. Selig, 195 Fed. Rep. 153).

THE PENALTY FOR "DOING BUSINESS" IN WISCONSIN imposed on foreign corporations failing to comply with section 1770 b, Stat. 1898, is that "every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within this state * * * shall be held void on its behalf and on behalf of its assigns, but shall be enforceable against it or them." An Indiana corporation shipped a machine to one Paul Welbes, chairman of the Town of Lake, in Wisconsin, on the understanding that it was to be purchased by the town. Immediately upon the arrival of the machine in Milwaukee it was delivered to Welbes, who put it to use there for himself. On the evening of the day it arrived the members of the Town Board of the town of Lake, made a contract to purchase the machine. The Supreme Court of Wisconsin held that when the contract was entered into the machine was no longer in the possession of the carrier, had ceased to be an object of interstate commerce and had become property within the

state. Therefore, the company could not recover on its contract, which was void under the statute cited. (Indiana Road Machine Company vs. Town of Lake, 136 N. W. 178.)

THE PENALTY FOR "DOING BUSINESS" IN NEW YORK BY A FOREIGN CORPORATION which has failed to obtain a certificate of authority to do business, is as follows: "No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless prior to the making of such contract it shall have procured such certificate." (Sec. 15, General Corporation Law.) This has long been held to bar a foreign corporation from suing in the courts of the state on contracts entered into prior to obtaining a certificate of authority, but not to preclude it from bringing suits in the Federal Courts on such contract. This principle was affirmed by the Supreme Court of the United States in a case just decided. (David Lupton's Sons Company v. The Automobile Club of America, decided June 7, 1912. Not yet reported.)

THE PENALTY FOR "DOING BUSINESS" IN ALABAMA without complying with the provision of Sections 3647 and 3648 of the Code of 1907 reads as follows: "All contracts made in this state by any foreign corporation which has not first complied with the provisions of the two preceding sections shall, at the option of the other party to the contract, be wholly void." (Sec. 3649.) No action can be maintained in the federal courts on such invalid contract. (Thomas v. Birmingham Railway, Light and Power Co., April 13, 1912, 195 Fed. Rep. 340.) In this case the court held that although the contract was executed outside the state it was performed within the state and was not an act of interstate commerce. If, before engaging in the performance of the contract, the company had complied with the state laws as to entrance conditions, the contracts would have been valid.

THE WORKMEN'S COMPENSATION LAW OF RHODE ISLAND (Ch. 831, L. 1912) approved April 29th last, goes into effect October 1, 1912. The act applies to all employees, except those engaged in domestic service or agriculture, but exempts employers who employ less than six workmen or operatives regularly in the same business, although such employers may, if they so desire, become subject to the act. The law is elective. If the employer elects not to be subject to the act, the common law defenses of contributory negligence, the fellow-servant rule and assumption of risk are denied him; but they may be used by an employer who has elected to become subject to the act. Election is made by filing a written acceptance of the provisions of the act with the commissioner of industrial statistics and posting copies of such acceptance in the places of employment covered thereby. Such acceptance may be terminated by the employer at the end of any yearly period by filing a notice to that effect at least sixty days prior to the expiration of the year with the said commissioner and by giving reasonable notice to his workmen. When an employer accepts the provisions of the act, each employe shall be held to have waived his right to action at common law to recover damages for personal injuries unless he files notice to the contrary with the commissioner within ten days thereafter, or if he is hired after such acceptance, written notice must be given the employer at the time of hiring and filed within ten days thereafter. This notice must also be filed annually by the employe, otherwise he will be held to have elected to become subject to the act at the close of the yearly period for which the last notice was given.

The act provides that no compensation shall be paid for injury or death of an employee occasioned by his wilful intention or resulting from intoxication while on duty, nor for injuries which do not incapacitate the em-

ployee for at least two weeks from earning full wages. Compensation begins on the fifteenth day after the injury, but during the first two weeks, however, reasonable medical and hospital services shall be furnished. The unit of compensation is one-half the average weekly wages of the employee, but in no case shall the weekly payment be more than ten dollars nor less than four dollars. In case of death it is paid for a period of three hundred weeks; when total incapacity for work results from an injury the maximum period of payment shall not exceed five hundred weeks; if the incapacity is partial, the maximum period of payment shall not exceed three hundred weeks and the amount paid shall be one-half the difference between the average weekly wage before the injury and the average weekly wage the employee is able to earn thereafter. An additional period of compensation is allowed when the injury causes the loss of both hands or both feet, one hand or one foot, two or more fingers or toes or one finger or toe, ranging from one hundred weeks for the first to twelve weeks for the last.

In case of death full payment is made as above when the deceased employee leaves persons wholly dependent on him. If he leaves dependents only partly dependent on him the payment is prorated in proportion to the amount of wages he contributed to them. If he leaves no dependents only the reasonable expenses of last sickness and burial are paid, which shall not exceed two hundred dollars.

Notice must be given the employer within thirty days after the injury and claim for compensation must be made within one year. No claims for compensation are assignable and contingent fees of attorneys for services under the act are subject to approval of the court.

When an agreement is reached between employer and employee as to compensation, a memorandum thereof shall be filed with the clerk of the Superior Court. If they fail to reach an agreement a petition may be filed by either party with the clerk of the Superior Court. The adverse party must file an answer within ten days thereafter. The justice shall decide the controversy in a summary manner and enter a decree. Appeal may be taken from this to the Supreme Court of the state upon any question of law or equity. Alternative schemes of compensation, benefit or insurance are permitted by the act provided they confer benefits as great as those under the act. Such schemes must be approved by the Superior Court which may terminate them at any time upon good cause shown.

THE RULE OF THE UNITED STATES SUPREME COURT FOR APPLICATION FOR WRITS OF CERTIORARI, being section 3 of Rule 37 was amended on June 10, 1912, to read as follows.

"3. Where an application is submitted to this court for a writ of certiorari to review a decision of a circuit court of appeals or any other court, it shall be necessary for the petitioner to furnish as an exhibit to the petition a certified copy of the entire transcript of record of the case, including the proceedings in the court to which the writ of certiorari is asked to be directed. The petition shall contain only a summary and short statement of the matter involved and the general reasons relied on for the allowance of the writ. A failure to comply with this provision will be deemed a sufficient reason for denying the petition. Thirty printed copies of such petition and of any brief deemed necessary shall be filed. Notice of the date of submission of the petition, together with a copy of the petition and brief, if any, in support of the same shall be served on the counsel for the respondent at least two weeks before such date in all cases except where the counsel to be notified resides west of the Rocky. Mountains, in which cases the time shall be at least three weeks. The brief for the respondent, if any, shall be filed at least three days before the date fixed for the submission of the petition. Oral argument will not be permitted on such petitions, and no petition will be received within three days next before the day fixed upon for the adjournment of the court for the term."

THE RETURN OF NET INCOME under the Federal Corporation Law is required to be filed by every corporation, joint stock company, association or insurance company not specifically enumerated as exempt, whether it may have net income liable to the tax or not. This ruling of the Commissioner of Internal Revenue has been questioned by many corporate officers who take the position that no return need be filed if the income does not exceed $5,000. The District Court of the United States for the Western Division of the Western District of Missouri has now held that the ruling of the commissioner is reasonable and will not be overruled by the court. (U. S. v. Military Construction Company. Not yet reported.) The United States, through the District Attorney, at the instance of the Commissioner of Internal Revenue, brought suit against the Military Construction Company to recover penalty for failure to make return. The defendant answered that its entire net annual income is iess than $5,000 and in consequence thereof, that it is not subject to such corporation tax, and was not required to make a return to the Collector of Internal Revenue. To this answer the government demurred and the demurrer was sustained.

THE DISSOLUTION OF A COMPANY does not relieve it from liability for the Federal Corporation Tax nor from making returns. The directors who become trustees upon dissolution were held to be the proper officers to make the return. (U. S. v. General Inspection and Loading Company, decided November 9, 1911, 192 Fed. Rep. 223.) This was an action on demurrer to pleas. The demurrer having been sustained the plea of the general issue was decided May 21, 1912 (not yet reported), the court holding that the dissolved company was liable for the amount of tax with penalty and interest. The company contended that no demand for payment had been received from the Collector, but the facts were that such notice had been mailed to the person who was the registered agent of the company at the time of its dissolution, and although he had no recollection of receiving it, it was presumed to have been delivered as the envelope in which it was mailed bore the return address of the Collector and had not been returned by the Post Office Department. The fact that the company had been dissolved previous to receipt of the notice by its former registered agent, did not render the notice insufficient and nugatory.

MINING COMPANIES PAYING THE FEDERAL CORPORATION TAX may deduct as depreciation an amount equal to the value per unit of the ore as it lies in the ore beds multiplied by the total amount of the ore removed during the year, and it does not matter that the books are not kept in such a way as to show such depreciation, nor does it matter whether the property was bought at a very high or very low price or whether the capitalization of the company is large or small. This principle was applied to the case of United States v. Nipissing Mines Company by Justice Lacombe of the United States District Court, Southern District of New York in his directions to the jury, May 14, 1912.

SPECIAL NOTICE REGARDING THE FEDERAL CORPORATION TAX. This tax must be paid on or before the 30th day of June. If not paid on that date and within ten days after notice and demand has been made by the collector, there is added 5 per cent of the amount of tax unpaid and interest at the rate of 1 per cent per month from the time tax becomes due.

Notice is sent to all corporations of the amount of tax assessed against them. This notice is directed to the principal place of business of the corporation as it appears from the return of net income. If such notice has not been received, application should be made at once to the collector for a statement of the amount of tax assessed against the corporation.

Payment should be made by certified check.